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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CFA Properties, Inc.

Serial No. 78397347

Michael D. Hobbs, Jr. of Troutman Sanders LLP for CFA
Properties, Inc.

Carol Spils, Trademark Examining Attorney, Law Office 104
(Chris Doninger, Managing Attorney).

Before Quinn, Grendel and Kuhlke, Administrative Trademark
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark TRIM TRIO (in standard character form) for
services recited in the application as "restaurant
services."¹

¹ Serial No. 78397347, filed April 6, 2004. The application was originally filed based on intent-to-use under Trademark Act Section 1(b), 15 U.S.C. §1051(b). Applicant subsequently filed an Amendment to Allege Use, alleging May 31, 2004 as the date of first use of the mark anywhere and the date of first use of the mark in commerce.

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark, as applied to applicant's services, so resembles the mark TRIO, previously registered on the Principal Register (in standard character form) for "restaurant services,"² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

The appeal is fully briefed. No oral hearing was requested. We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 2657462, issued December 10, 2002.

The second *du Pont* factor requires us to determine whether applicant's services and the registrant's services are similar or dissimilar. The third *du Pont* factor requires us to determine whether the trade channels for applicant's and registrant's respective services are similar or dissimilar. We find that applicant's services as recited in the application, "restaurant services," are legally identical to the "restaurant services" recited in the cited registration. Applicant's arguments and evidence purporting to show that its restaurant services, as actually rendered, are dissimilar to the restaurant services actually rendered by the registrant, are unavailing. Because there is no limitation in either applicant's or registrant's recitation of services, we must presume that both applicant and registrant render all types of, and indeed identical types of, "restaurant services." We further must presume that these identical services are rendered in identical trade channels and to identical classes of purchasers, regardless of what the evidence might show to be applicant's and registrant's actual trade channels and classes of purchasers. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639 (TTAB 1981). For these reasons, we find that the second

and third *du Pont* factors weigh in favor of a finding of likelihood of confusion.

We also find, under the fourth *du Pont* factor (conditions of purchase), that the broadly-recited "restaurant services" identified in applicant's application and in the cited registration must be deemed to include inexpensive restaurant services which are or could be purchased by ordinary consumers on impulse, without a great deal of care and sophistication. The fourth *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion.

Under the sixth *du Pont* factor (number and nature of similar marks in use on similar services), applicant has submitted Internet evidence showing the existence of several other restaurants around the United States which are called TRIO, or TRIOS.³ However, in the absence of evidence showing the extent of use of these other marks, we find that the sixth *du Pont* factor weighs only slightly in applicant's favor in our likelihood of confusion analysis. See, e.g., *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125, 1131 (TTAB 1995).

³ The third-party registration evidence submitted by applicant is not probative evidence under the sixth *du Pont* factor. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

We turn finally to the first *du Pont* factor, which requires us to determine whether applicant's mark TRIM TRIO is similar or dissimilar to the cited registered mark TRIO, when the marks are compared in their entireties in terms of appearance, sound, connotation and overall commercial impression. See *In re Palm Bay Imports, Inc.*, *supra*. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In terms of appearance, sound, connotation and overall commercial impression, we find that applicant's mark TRIM TRIO and the cited registered mark TRIO are obviously similar to the extent that the word TRIO appears in both, but dissimilar to the extent that applicant's mark, but not registrant's mark, also includes the word TRIM. On balance, however, and for the reasons discussed below, we find the marks to be more similar than dissimilar.

Although there appear to be several other restaurants around the country with the name TRIO, it nonetheless appears that TRIO is an arbitrary designation as applied to restaurant services. As applicant itself notes at pages 7-8 of its main appeal brief: "The Cited Mark is simply 'TRIO,' meaning 'three.' It could allude to the number of owners of the restaurant. It could be the number of Michelin stars earned by the restaurant. It could be the nickname of the owner's dog." TRIO thus is an arbitrary term without any obvious significance or meaning as applied to restaurant services; as such, it is a strong and distinctive source indicator.

TRIM, by contrast, is somewhat suggestive of restaurant services, as applicant itself contends: "...the Applicant's mark suggests to customers that the components of the meals provided by Chick-fil-A are healthy and will

contribute to its customers remaining at an appropriate weight if they consume these meals." (Applicant's main brief at 8.) We therefore find that the arbitrary designation TRIO is the dominant feature in the commercial impression created by applicant's mark. See *In re Chatam International Inc.*, *supra*; *In re National Data Corp.*, *supra*. That dominant feature is identical to registrant's mark.

Applicant's mark consists of the registered mark in its entirety, plus the additional word TRIM. We find that applicant's addition of the suggestive word TRIM to the arbitrary designation TRIO does not suffice to distinguish the two marks. Moreover, we are not persuaded by applicant's "alliteration" argument; the mere fact that TRIM TRIO is an example of alliteration does not suffice to distinguish the marks in this case.

In short, we find that any dissimilarity between the marks which results from applicant's addition of the word TRIM to its mark is greatly outweighed by the basic similarity between the marks which results from the presence in both marks of the arbitrary designation TRIO. That is, consumers are more likely to assume, based on the presence of the word TRIO in both marks, that a source connection exists, than they are likely to assume, based on

the presence of the additional word TRIM in applicant's mark, that no source connection exists. Finally, in cases such as this, where the applicant's services are identical to the services recited in the cited registration, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the services were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We find that applicant's mark is sufficiently similar to the cited registered mark that confusion is likely to result from use of the two marks in connection with the identical "restaurant services" involved herein. The first *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion.

In summary, we find that applicant's and registrant's services, and the trade channels for those services, are legally identical. The services are of the type which may be purchased on impulse. Although there may be several other TRIO restaurants around the country, we find that TRIO nonetheless is an arbitrary designation as applied to restaurant services and that the cited registered mark therefore is strong and distinctive. The presence of the word TRIO in applicant's mark renders the marks similar in

terms of their overall source-indicating commercial impression; applicant's addition of the word TRIM does not suffice to distinguish the marks.

Weighing all of the evidence of record as it pertains to the *du Pont* factors, we conclude that a likelihood of confusion exists. To the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.